Neutral Citation Number: [2024] EWCA Civ 486

Case No: CA-2023-000952

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISON
ADMINISTRATIVE COURT
MR JUSTICE FORDHAM
[2023] EWHC 977 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2024

Before:

LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE LEWISON

and

LADY JUSTICE FALK

- -

Between:

(1) BEECH DEVELOPMENTS (MANCHESTER) LIMITED **(2) WESTPOINT MANCHESTER LIMITED** **(3) NEWTON STREET MANCHESTER LIMITED** **(4) PS 121 LIMITED** **(5) BYROM STREET LIMITED** **(6) BLACKFRIARS STREET LIMITED**	**Appellants**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Michael Firth KC (direct access) for the **Appellants**
Philip Simpson KC (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Respondents**

Hearing dates: 24 and 25 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 9 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal against a decision of Fordham J dismissing a claim for judicial review brought by six related entities, which for convenience I will refer to collectively as "Beech". The appeal, which is brought with the permission of the judge, engages a single point of interpretation of the regulations governing the Construction Industry Scheme ("CIS").

2. The CIS is provided for by Chapter 3 of Part 3 of the Finance Act 2004 ("FA 2004"). The governing regulations are the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005/2045 (the "CIS regulations"). It is uncontroversial that the broad purpose of the CIS is to reduce the risk of evasion of tax by workers in the construction industry. In outline, it does so by requiring persons who carry on construction business and certain others ("contractors") to make deductions from payments to persons engaged by them ("sub-contractors") and account for the amounts deducted to HMRC. The cost of materials is excluded so that the deduction is confined to the element attributable to labour. Amounts so deducted are then available for credit against the sub-contractor's own liabilities. The rate of deduction is determined by the status of the sub-contractor. If the sub-contractor is not registered with HMRC the rate is currently 30%. If the sub-contractor is registered the rate is 20%. However, if certain conditions are met it is possible to register for gross payment, in which case no deduction will be made.

3. This appeal relates to a situation where, contrary to the terms of the legislation, no deduction, or an insufficient deduction, is made from a payment to a sub-contractor not registered for gross payment. In that case the contractor must still account to HMRC for the amount that should have been deducted. If they do not do so then HMRC may make a "determination" of the amount in question under reg. 13 of the CIS regulations, which is treated for the purposes of the Taxes Management Act 1970 ("TMA 1970") as if it was an assessment to income tax. Further – and unsurprisingly given that no deduction has been suffered – there is no provision that permits the sub-contractor to obtain a credit against their own liabilities for amounts that the contractor is required to pay but which have not been deducted. However, where the sub-contractor does in fact meet their own tax liabilities the mischief at which the scheme is aimed is not only not present, but without more HMRC would receive and retain a greater sum than they would have been entitled to had the correct deduction been made. Alternatively, the contractor may have taken care to comply with the CIS regime but made an innocent mistake and be left out of pocket.

4. Regulation 9 of the CIS regulations recognises these possibilities by providing a mechanism that empowers HMRC, if certain conditions are satisfied (referred to as condition A or condition B), to issue a direction to the effect that the contractor is not required to pay. Prior to this appeal HMRC's interpretation of the CIS regulations, which has in the past also been adopted by the First-tier Tribunal ("FTT"), has been that there is no power to issue a direction under reg. 9 if a determination has already been made under reg. 13 of the amount in question. Fordham J agreed. As I will explain, HMRC have modified their position to one which requires as a minimum that the application of reg. 9 has been raised by the contractor before a determination is made.

5. Beech's position is that there is no such requirement. They say that reg. 9 may be put in issue following a determination, which will only become final and therefore unable to be affected by a direction if it is not appealed or, if it is appealed, when the appeal is finally determined.

6. I have reached the conclusion that Beech's interpretation is to be preferred.

The relevant legislation

FA 2004

7. As in force during the relevant period, the most relevant provisions of the primary legislation in FA 2004 were as follows:

> "**61. Deductions on account of tax from contract payments**
> (1) On making a contract payment the contractor … must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to any other person of materials used or to be used in carrying out the construction operations to which the contract under which the payment is to be made relates.
> (2) In subsection (1) "the relevant percentage" means such percentage as the Treasury may by order determine.
> (3) That percentage must not exceed—
> (a) if the person for whose labour (or for whose employees' or officers' labour) the payment in question is made is registered for payment under deduction, the percentage which is the basic rate for the year of assessment in which the payment is made, or
> (b) if that person is not so registered, the percentage which is the higher rate for that year of assessment."

(The terms contractor, sub-contractor and contract payment are defined in ss. 58-60. Subject to some exceptions, a contract payment is essentially a payment by a contractor to a sub-contractor under a contract relating to "construction operations", a concept broadly defined in s.74.)

> **"62. Treatment of sums deducted**
> (1) A sum deducted under section 61 from a payment made by a contractor—
> (a) must be paid to the Board of Inland Revenue, and
> (b) is to be treated for the purposes of income tax or, as the case may be, corporation tax as not diminishing the amount of the payment.
> (2) If the sub-contractor is not a company a sum deducted under section 61 and paid to the Board is to be treated as being income tax paid in respect of the sub-contractor's relevant profits. If the sum is more than sufficient to discharge his liability to income tax in respect of those profits, so much of the excess as is required to discharge any liability of his for Class 4 contributions is to be treated as being Class 4 contributions paid in respect of those profits.
> (3) If the sub-contractor is a company—
> (a) a sum deducted under section 61 and paid to the Board is to be treated, in accordance with regulations, as paid on account of any relevant liabilities of the sub-contractor;

(b) regulations must provide for the sum to be applied in discharging relevant liabilities of the year of assessment in which the deduction is made;

(c) if the amount is more than sufficient to discharge the sub-contractor's relevant liabilities, the excess may be treated, in accordance with the regulations, as being corporation tax paid in respect of the subcontractor's relevant profits; and

(d) regulations must provide for the repayment to the sub-contractor of any amount not required for the purposes mentioned in paragraphs (b) and (c).

(4) For the purposes of subsection (3) the "relevant liabilities" of a sub-contractor are any liabilities of the sub-contractor, whether arising before or after the deduction is made, to make a payment to the Inland Revenue in pursuance of an obligation as an employer or contractor.

(5) In this section—

(a) "the sub-contractor" means the person for whose labour (or for whose employees' or officers' labour) the payment is made;

(b) references to the sub-contractor's "relevant profits" are to the profits from the trade, profession or vocation carried on by him in the course of which the payment was received;

(c) "Class 4 contributions" means Class 4 contributions within the meaning of the Social Security Contributions and Benefits Act 1992 (c. 4) or the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c. 7).

(6) References in this section to regulations are to regulations made by the Board of Inland Revenue.

(7) Regulations under this section may contain such supplementary, incidental or consequential provision as appears to the Board to be appropriate.

…

71. Collection and recovery of sums to be deducted

(1) The Board of Inland Revenue must make regulations with respect to the collection and recovery, whether by assessment or otherwise, of sums required to be deducted from any payments under section 61.

…"

8. As can be seen, s.71 requires regulations to provide for the recovery of sums that should have been deducted as well as sums actually deducted. However, the crediting provisions in s.62 apply only to sums actually deducted. In respect of those, for a non-corporate sub-contractor the credit is primarily against their income tax liability (s.62(2)). For a corporate sub-contractor the credit is first against its liabilities as an employer and contractor ("relevant liabilities" – typically PAYE and NICs, together with its own CIS liabilities), and only thereafter may be set against tax on its profits. The reasons for the difference in approach, beyond the point that a corporate entity obviously needs to employ individuals or otherwise contract with other persons to carry out construction work rather than do the work itself, were not explained.

The CIS regulations

9. Regulation 7 of the CIS regulations reflects the primary legislation: It provides:

> "**7. Payment, due date for payment of amounts deducted and receipts**
> (1) A contractor must pay to the Commissioners for Her Majesty's Revenue and Customs all amounts he was liable under section 61 of the Act to deduct on account of tax from contract payments made by him during that tax period—
> (a) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or
> (b) within 14 days after the end of the tax period, in any other case.
> …"

(The "tax period" is either monthly or quarterly.)

10. Regulation 9 provides as follows:

> "**9. Recovery from sub-contractor of amount not deducted by contractor**
> (1) This regulation applies if—
> (a) it appears to an officer of Revenue and Customs that the deductible amount exceeds the amount actually deducted, and
> (b) condition A or B is met.
> (2) In this regulation—
> "the deductible amount" is the amount which a contractor was liable to deduct on account of tax from a contract payment under section 61 of the Act in a tax period;
> "the amount actually deducted" is the amount actually deducted by the contractor on account of tax from a contract payment under section 61 of the Act during that tax period;
> "the excess" means the amount by which the deductible amount exceeds the amount actually deducted.
> (3) Condition A is that the contractor satisfies an officer of Revenue and Customs—
> (a) that he took reasonable care to comply with section 61 of the Act and these Regulations, and
> (b) that—
> (i) the failure to deduct the excess was due to an error made in good faith, or
> (ii) he held a genuine belief that section 61 of the Act did not apply to the payment.
> (4) Condition B is that—
> (a) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies either—
> (i) was not chargeable to income tax or corporation tax in respect of those payments, or
> (ii) has made a return of his income or profits in accordance with section 8 of [TMA 1970] (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class

> 4 contributions due or corporation tax due in respect of such income or profits; and
>
> (b) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5).
>
> (5) An officer of Revenue and Customs may direct that the contractor is not liable to pay the excess to the Commissioners for Her Majesty's Revenue and Customs.
>
> (6) If condition A is not met an officer of Revenue and Customs may refuse to make a direction under paragraph (5) by giving notice to the contractor ("the refusal notice") stating—
>
> (a) the grounds for the refusal, and
>
> (b) the date on which the refusal notice was issued.
>
> (7) A contractor may appeal against the refusal notice—
>
> (a) by notice to an officer of Revenue and Customs,
>
> (b) within 30 days of the refusal notice,
>
> (c) specifying the grounds of the appeal.
>
> (8) For the purpose of paragraph (7) the grounds of appeal are that—
>
> (a) that the contractor took reasonable care to comply with section 61 of the Act and these Regulations, and
>
> (b) that—
>
> (i) the failure to deduct the excess was due to an error made in good faith, or
>
> (ii) the contractor held a genuine belief that section 61 of the Act did not apply to the payment.
>
> (9) If on an appeal under paragraph (7) that is notified to the tribunal it appears that the refusal notice should not have been issued the tribunal may direct that an officer of Revenue and Customs make a direction under paragraph (5) in an amount the tribunal determines is the excess for one or more tax periods falling within the relevant year.
>
> (10) If a contractor has deducted an amount under section 61 of the Act, but has not paid it to the Commissioners for Her Majesty's Revenue and Customs as required by regulation 7 (payment, due date etc. and receipts), that amount is treated, for the purposes of determining the liability of any sub-contractor in respect of whose liability the sum was deducted, as having been paid to the Commissioners for Her Majesty's Revenue and Customs at the time required by regulation 8 (quarterly tax periods)."

11. There are a number of points worth making about reg. 9 at this stage:

a) The mechanism provided by reg. 9 has no direct counterpart in the primary legislation. However, there is no dispute that the *vires* for it exist, either within s.71 FA 2004 (see [7] above) or within s.73, which contains supplementary regulation-making powers.

b) The heading to reg. 9 is somewhat confusing. It gives the impression that reg. 9 provides a collection mechanism for recovery from the sub-contractor. In fact it does not do so: those collection mechanisms are to be found elsewhere in the tax regime. Instead, a direction under reg. 9 relieves the contractor from the liability that they would otherwise have to account to HMRC under the CIS regime. A

direction has no effect on the position of the sub-contractor, whose entitlement to a credit is available only in respect of amounts actually deducted: see above.

c) Importantly, reg. 9(6)-(9) provides a mechanism for an appeal against a refusal to give a direction under reg. 9(5), but only in relation to condition A, not condition B. It was common ground that the only remedy for a wrongful refusal by HMRC to make a direction on the basis that condition B was met lies in judicial review. Those instructing Mr Simpson KC, for HMRC, were unable to assist with a possible explanation for the distinction. The only one that Mr Firth KC, for Beech, suggested, and with which Mr Simpson did not disagree, relates to taxpayer confidentiality, the point being that condition B relates to the tax position of the sub-contractor, which may well be an unrelated party (albeit that it is not in this case). That is understandable, but it provides no explanation as to how a contractor might be able to bring any form of challenge, whether in judicial review or otherwise, in circumstances where they do not have knowledge of the sub-contractor's tax position.

d) Though less obviously of significance, the application of condition B requires a request to be made to HMRC (see reg. 9(4)(b)), but there is no equivalent to that in condition A. However, as Mr Simpson fairly pointed out it will be the contractor rather than HMRC who is likely to possess the information necessary to establish that the requirements of condition A are met.

e) The permitted grounds of appeal in respect of a refusal to make a direction in relation to condition A correspond precisely to the terms of that condition, with the exception of any reference to an officer of HMRC being satisfied. In other words, the FTT is given a full fact-finding rather than a merely supervisory role. It follows that, if the FTT finds that the grounds of appeal are made out because reasonable care has been taken and there has been an error in good faith or there was the requisite genuine belief, then the tribunal can require HMRC to make a direction under reg. 9(5), and no doubt will do so.

f) There is a marked difference between the tax referred to in condition B and the "relevant liabilities" referred to in s.62 (as to which see [8] above). Relevant liabilities are primarily liabilities as an employer and contractor, whereas condition B relates to liability to income or corporation tax on the sums in question, and whether any tax due on the income or profits has been discharged. The difference in approach was not explained.

g) Finally, requiring HMRC to make a direction under reg. 9(5) is the only remedy that the FTT can provide. It cannot, for example, make the direction itself.

12. Regulation 13 provides (emphasis supplied):

> "**13. Determination of amounts payable by contractor and appeal against determination**
> (1) This regulation applies if—
> (a) there is a dispute between a contractor and a sub-contractor as to—
> (i) whether a payment is made under a construction contract, or

(ii) the amount, if any, deductible by the contractor under section 61 of the Act from a contract payment to a sub-contractor or his nominee, or

(b) an officer of Revenue and Customs has reason to believe, as a result of an inspection under regulation 51 or otherwise, that there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them, or

(c) an officer of Revenue and Customs considers it necessary in the circumstances.

(2) An officer of Revenue and Customs may determine the amount which to the best of his judgment a contractor is liable to pay under these Regulations, and serve notice of his determination on the contractor.

(3) A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation.

(4) A determination under this regulation may—

(a) cover the amount payable by the contractor under section 61 of the Act for any one or more tax periods in a tax year, and

(b) extend to the whole of that amount, or to such part of it as is payable in respect of—

(i) a class or classes of sub-contractors specified in the notice of determination (without naming the individual sub-contractors), or

(ii) one or more named sub-contractors specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of [TMA 1970] (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount determined were income tax charged on the contractor,

and those Parts of that Act apply accordingly with any necessary modifications, except that the amount determined is due and payable 14 days after the determination is made.

(6) If paragraph (1)(a) applies and an officer of Revenue and Customs does not make a determination under paragraph (2), either the contractor or the sub-contractor may on giving notice to an officer of Revenue and Customs, apply to the tribunal to determine the matter.

...

(8) If paragraph (1)(a) applies—

(a) the contractor must make the deduction required by section 61 of the Act from the contract payment or the part of the contract payment, to which the dispute relates, and the amount so deducted is treated as a sum which he is liable to pay to the Commissioners for Her Majesty's Revenue and Customs under these Regulations; and

(b) any amount which, on a final determination of the dispute, is shown not to have been so payable is, except where regulation 56 (application by the Commissioners for Her Majesty's Revenue and Customs of sums deducted under section 61 of the Act) applies, treated as an overpayment of income tax or corporation tax by the sub-contractor."

13. The dispute relates to the interpretation of the second limb of reg. 13(3). Ignoring the modification of their case that has already been referred to, HMRC say that it effectively

mirrors the first limb. Thus, just as a determination may not be made in respect of amounts in relation to which a reg. 9(5) direction has already been made, so a direction cannot be made in respect of amounts which have already been the subject of a determination.

14. Regulation 56 of the CIS regulations contains more detail about how sums deducted from payments to corporate sub-contractors are credited. In summary, they are applied to discharge liabilities in the following order: Class 1 NICs, PAYE and related liabilities (including student loans, sick pay funding amounts etc.) and CIS liabilities. Any balance is repayable to the sub-contractor, subject to provisos which include setting it off against any unpaid corporation tax for earlier periods (reg. 56(6)). There is no set off against corporation tax due for the period in question, so there appears to be no overlap at all with the tax referred to in condition B (see [11.f)] above).

TMA 1970

15. Section 30A TMA 1970 relevantly provides:

> "**30A. Assessing procedure**
> (1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
> …
> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.
> (4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.
> ..."

16. Under s.34 TMA 1970 the ordinary time limit for raising an assessment is four years, but this is subject to provisions which may allow a longer period. Section 31 confers a right of appeal against an assessment, which under s.31A must be notified to HMRC within 30 days of its issue. The notice of appeal must specify the grounds of appeal (s.31A(5)).

17. Where a notice of appeal has been given to HMRC, ss.49A-49H TMA 1970 give the appellant a choice. They may notify HMRC that they require HMRC to review "the matter in question", accept an offer by HMRC to conduct such a review, or instead proceed direct to the FTT by notifying the appeal to the tribunal. Where the review process is initiated HMRC will first provide their "view of the matter", before conducting a formal review of its decision. Following the outcome of the review a dissatisfied appellant may notify the appeal to the tribunal. Whether or not a review is conducted first, the role of the tribunal is to determine "the matter in question", which is defined as "the matter to which an appeal relates" (see ss.49D, 49G-49H).

18. Section 50(6) and (7) TMA 1970 provide for reductions and increases in assessments if the FTT decides that the appellant is undercharged or overcharged. Section 50(10) provides that, where an appeal is notified to the FTT, its decision is "final and conclusive". This is subject, in particular, to the provisions relating to appeals in the Tribunals, Courts and Enforcement Act 2007.

19. Section 54 deals with appeals that are settled by agreement in advance of a determination by the FTT. Section 54(1) provides:

> "**54. Settling of appeals by agreement**
> (1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be."

20. The remainder of s.54 confers a right for the taxpayer to resile from such an agreement, requires non-written agreements to be formalised and (in s.54(4)) provides a mechanism for a withdrawal of an appeal by the taxpayer to which HMRC do not object to have the same effect as an agreement.

The facts

21. The facts can be shortly stated. The appellants, Beech, comprise six companies in the same group that were each established to carry out a specific construction project. They all made payments to another group entity, Beech Construction Partnership Ltd ("BCPL"). From a commercial perspective BCPL acted as the main contractor in relation to each project, and it operated the CIS regime on the sub-contracts that it entered into. However, as between Beech and BCPL, the Beech entities were also "contractors" for CIS purposes and BCPL was a "sub-contractor", so Beech should have operated the regime as well. They did not do so.

22. When this was belatedly appreciated following an HMRC enquiry, BCPL successfully applied for gross payment status, which was granted from 13 August 2018. However, determinations were issued in March 2019 in respect of the amounts that HMRC estimated should have been deducted for the tax years ended 5 April 2016-2019, totalling over £5.4m. HMRC have proposed revisions during the course of the dispute which would reduce the sum to a little under £2.5m (excluding interest), but as can be seen the sum in dispute is still substantial.

23. Beech appealed the determinations. That appeal has been stayed by the FTT pending the resolution of the judicial review proceedings.

24. Regulation 9 of the CIS regulations was not invoked by Beech before the determinations was made, even though HMRC had (in accordance with their usual practice) raised the point in correspondence and warned that they would not be able to consider any claim under it after determinations had been issued. Regulation 9(3) (condition A) was first raised in correspondence after the determinations were issued. After the appeal was referred to the FTT following a review, the same condition was raised in further and better particulars filed with the FTT in January 2020. A request for a direction under reg. 9, relying on paragraph (4) (condition B), was only made in October 2021. It relied on

BCPL having paid all the corporation tax due on its profits. It was HMRC's refusal to consider this request, by a decision letter dated 13 December 2021, that led to the judicial review proceedings.

The judge's decision

25. The judge considered the legislation in some detail and then summarised four FTT cases, the most recent of which was *North Point (Pall Mall) Ltd v HMRC* [2021] UKFTT 0259 (TC) ("*North Point*"). As the judge explained, the conclusion in *North Point* was that, because a determination had already been made under reg. 13, the FTT had no jurisdiction to consider an appeal against a refusal to give a direction under reg. 9(5). This was so even though the appellant had brought an appeal against a refusal notice in relation to condition A, as contemplated by reg. 9(6)-(9), and indeed had in fact only been notified of that refusal at the same time as being sent the determinations (see *North Point* at para. 4(15)-(19)).

26. Having considered Beech's submissions, the judge found in favour of HMRC. He correctly concluded that where a liability had arisen under the CIS regulations a contractor could not simply rely on having met condition A or condition B to remove it; instead a direction was required under reg. 9 (see at [32]). He then considered the interpretation of reg. 13(3). In accepting HMRC's interpretation ([40]-[53]) the judge stressed the public law obligations to which HMRC are subject, including duties to act reasonably and fairly, being obligations which are amenable to judicial review. The judge also relied on the existence of a power on the part of HMRC to withdraw a determination, being a power which would similarly be subject to supervision by way of judicial review.

27. The judge considered that Beech's distinction between the first and second limb of reg. 13(3) was undermined by their acceptance of the preclusive effect of the first limb, despite the fact that it says "must not include" rather than saying that a determination "may not be made". Rather, the two limbs operated in a symmetrical way. The ability to obtain a direction under reg. 9 was not open-ended. Beech's argument that a direction could be made after a reg. 13 determination but not take effect until the determination was removed by HMRC or the FTT gave the words "do not apply to" in the second limb an artificial and subversive meaning. The judge accepted that HMRC's interpretation meant that there was scope for abuse by HMRC, but this was mitigated by their public law duties and their power to withdraw a determination, the effect of which would be to allow a subsequent direction to be made. In relation to the situation in *North Point*, at [53] the judge wondered whether the FTT might be able to direct HMRC to make a direction with effect from the date of refusal, but noted that the point had not been argued and in any event the "public law protection remains".

Grounds of appeal

28. The grounds of appeal can be summarised as follows:

    (1) The judge relied on public law principles in dismissing the claim, but what was being challenged was the officer's denial of any power to act under reg. 9(5), such that there was nothing on which those principles could operate.

(2) The judge misunderstood the argument about the preclusive effect of the first limb of reg. 13(3), which was that amounts in respect of which a reg. 9(5) direction had been made could not be included in a determination, but other amounts could be.

(3) The judge failed to recognise the basic principle that liabilities to HMRC should not be discretionary or based on HMRC's munificence, or the constitutional heresy of interpreting the regulations to allow HMRC to retain amounts on account of tax, amounting to a multi-million pound windfall, where any tax liability has been fully discharged.

(4) The judge misunderstood the breadth of HMRC's collection and management powers under s.5 Commissioners for Revenue and Customs Act 2005 and wrongly analysed the regulations on the basis that HMRC might decide to use those powers to withdraw a determination.

29. The grounds of appeal and original supporting skeleton argument were prepared by Counsel who had represented Beech before the judge. Following a change of Counsel a supplementary skeleton was filed which largely replaced the previous skeleton. With one exception to which it will not be necessary to refer, HMRC did not object to the revised arguments, which were responded to by a further skeleton argument shortly before the hearing.

30. The submissions raised by Mr Firth included, in particular, a new argument that HMRC did not in fact have any power to withdraw a determination, due to the effect of s.30A(4) TMA 1970.

Discussion

31. To recap, reg. 13(3) provides:

> "(3) A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation."

32. Looking first at the ordinary meaning of the words used in reg. 13(3), I can see the merit of the judge's interpretation. There is no dispute that the first limb has the effect that, if a direction under reg. 9 has already been made in respect of an amount, a later determination cannot include that amount. It is natural to assume that the second limb is intended to have the opposite effect – described in the court below as a "symmetrical" effect – if a determination is made prior to a direction. While there is a difference in wording ("must not include" as opposed to "do not apply"), that could be explained by reference to the differences between the concepts of direction and determination. A direction is made in respect of an amount, as the first limb recognises, but a determination is made of an amount (reg. 13(2): an officer "may determine the amount…"). That could be enough to displace the (relatively weak) presumption referred to by Lord Sumption in *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23, [2017] 1 WLR 1249 at [22] that differences in language used to describe comparable concepts are intended to reflect differences in meaning. It would not be possible straightforwardly to say that a direction "must not include" an amount that has been determined.

33. I also agree with the judge that Beech's interpretation of permitting what was described below as a "hibernating" direction is not a straightforward one. This was the description used of the consequence of Beech's argument that a direction can be made under reg. 9 while there is an extant determination, while recognising that the direction cannot have an operative effect under reg. 13(3) unless and until the determination has itself been reduced or cancelled. This involves reading the words "do not apply" as effectively meaning that a direction (a) may be made in respect of an amount determined under reg. 13, but (b) will have an operative effect only when there is no longer a determination of that amount.

34. However, it is also the case that Beech's interpretation is not precluded by the words used. In particular, the second limb of reg. 13(3) does not say that directions "may not be made" in respect of amounts determined under reg. 13. It could easily have done so, and that would have been clear. As discussed below, the consequences of HMRC's approach are far-reaching, such that clear words might be expected if it was intended.

35. Further, there is merit in ground 2 of Beech's appeal, to the effect that the judge misunderstood the argument about the preclusive effect of the first limb of reg. 13(3). The "must not include" language recognises that a single determination may be made that covers different amounts, including amounts in respect of which no direction has been made. For example, a single determination may cover amounts that relate to more than one sub-contractor: see reg. 13(4) (set out at [12] above).

36. More importantly, contextual considerations point clearly to Beech's interpretation.

37. The first point to note is that, once made, a direction under reg. 9 is final. There is no provision in the regulations that contemplates that it might be adjusted or removed later. The appeal provisions in reg. 9 relate to a refusal to issue a direction, not to the terms of a direction that is issued.

38. In contrast, a determination may be adjusted upwards or downwards, including to nil. It is made "to the best of [the officer's] judgment" (reg. 13(2)) and is subject to appeal under TMA 1970 as if it were an assessment (reg. 13(5)). It will become final only when it is either not appealed within the requisite time limit or any appeal is finally determined, whether through tribunal proceedings or through the operation of s.54 TMA 1970.

39. In that respect there is therefore no symmetry. The first limb of reg. 13(3) presents no difficulty, because there is no need to address the possibility that a direction might cease to apply. Its existence simply precludes any determination of the amount in question. In contrast, a determination may fall away through the appeal process or be reduced so that it no longer covers a particular amount. Once that has occurred there would be nothing to prevent a direction operating in respect of that amount.

40. The second point to note is that the circumstances in which a direction may be made are set out in reg. 9, the operative provision being reg. 9(5) (an officer "may direct"). If reg. 13(3) was intended to curtail the circumstances in which a direction may be made then it might be expected that there would, as a minimum, be a cross-reference to that in reg. 9. Instead, reg. 13 more naturally deals with the interaction of directions and determinations that are actually made. Yet on HMRC's approach reg. 13(3) can remove the power apparently conferred by reg. 9 to make a direction, without there being any hint of that within reg. 9. That is somewhat surprising.

41. The third point relates to the reliance the judge placed on a power on the part of HMRC to withdraw a determination. As already mentioned, Mr Firth submitted that HMRC do not in fact have any power to withdraw a determination, due to the effect of s.30A(4) TMA 1970 (set out at [15] above). He relied on *Baylis v Gregory* [1989] 1 AC 398, where a tax inspector had issued an assessment but later marked in the Revenue's records that it had been "vacated" due to being "raised in error". The taxpayer argued that this nullified the assessment, but that was rejected by the Court of Appeal by reference to identical wording in what was then s. 29(6) TMA 1970.

42. Slade LJ (with whom the other members of the court agreed on this issue) noted at p.435 a possible distinction between the prohibition in the statute on an assessment being "altered" and withdrawal or vacation, but nonetheless concluded that the purported vacation was not made in accordance with the only provision that permits that (s.32 TMA 1970, which deals with double assessment), such that in the absence of statutory authority what the inspector had done was "not properly made and had no legal effect". In the course of reaching this conclusion Slade LJ referred to the significance of service of notice of an assessment under what is now s.30A(4), which engages the appeal process including ss.50 and 54.

43. Mr Firth's submission appears to me to have significant force. On the face of it, the provisions of TMA 1970 which are incorporated by reference into the CIS regulations contain a complete code that regulates how determinations can be adjusted, including to nil, once they have been notified. It is unsatisfactory that we did not have the benefit of any submissions on behalf of HMRC about what is surely a point of significance for assessments generally, on which they might reasonably be expected to have an established view. Instead, Mr Simpson's instructions were not to concede that Mr Firth's argument was correct, but instead to base his submissions more broadly on HMRC's collection and management powers.

44. It is unattractive not to decide a point which formed a key element of the judge's reasoning and which HMRC have not objected to being raised, but it is also undesirable to do so without the benefit of submissions from both parties unless it is essential. I have concluded that it is not essential. Rather, and contrary to the position before the judge, I have proceeded on the basis that no reliance should be placed on any possibility of a unilateral withdrawal of a determination by HMRC.

45. The fourth point is well illustrated by *North Point*. The effect of HMRC's interpretation of reg. 13(3), at least until modified during argument, is that the right of appeal to the FTT that is conferred in relation to a refusal to accept that condition A applies can be removed or nullified by the issue of a determination, including during the appeal process expressly provided for by the CIS regulations. That is an extraordinary result which would require clear words, because it contravenes general principles of access to justice. Those principles include that, once a dispute is submitted to a court (or, I would add, other tribunal), litigants should be able to rely on there being no usurpation of the tribunal's function: see *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 at [77], citing Lord Diplock's speech in *Attorney General v Times Newspapers Ltd* [1974] AC 273, 309. The point is not answered by the argument that abusive acts by HMRC could be restrained by judicial review. The most obvious reason why HMRC would issue a determination while there is an unresolved dispute as to whether reg. 9 applies is time limits. As Mr Firth fairly pointed out, if HMRC risked being out of time

if they did not issue a determination then they could hardly be criticised for doing so to protect the revenue.

46. The fifth point relates to concessions made by HMRC during the course of argument. Initially, Mr Simpson accepted that once an appeal against a refusal notice under reg. 9(6) was before the FTT then it would not be possible to oust its jurisdiction by a later determination. He also referred to the judge's speculation that the FTT might be able to direct HMRC to make a direction with effect from the date of refusal (see [27] above). However, when pressed Mr Simpson also appeared not to support the result in *North Point*, which was a situation where the contractor had had no chance to appeal, whether to HMRC or to the FTT, before the determination was made because it was notified of the determination and refusal notice at the same time (see [25] above). As I understood it, HMRC's "backstop" position became one which required as a minimum that the application of reg. 9 has been raised by the contractor and not received a favourable response before a determination is made.

47. As the apparently movable extent of the concession rather illustrates, there is no statutory basis to draw any of these distinctions. For example, although HMRC's general practice is to warn contractors about a need to invoke reg. 9 before a reg. 13 determination is made, there is no statutory requirement to provide such a warning and indeed HMRC's internal guidance refers to circumstances where no warning may be given. Further, there is neither anything in reg. 9 itself that restricts when directions can be sought or made, nor anything in reg. 13 that restricts the issue of a determination, or its operative effect, when there is or may be an ongoing dispute about the application of reg. 9.

48. As to reg. 9, it is worth noting that condition A and condition B are each framed in terms of an officer being "satisfied" of certain things. It follows that it is not straightforward to see how either condition could be treated as met prior to a determination being issued if a reg. 9 direction is not in fact made before that occurs. That is so both where a direction has been requested and refused and where reg. 9 has not been raised at all. Further, while the underlying requirements of condition A as to reasonable care and good faith or genuine belief will require a factual enquiry into the circumstances around the date of the payment, condition B necessarily involves the consideration of later events insofar as it relates to meeting tax liabilities for the period in question. Regulation 9 contains nothing to indicate that HMRC's ability to satisfy themselves as to whether either condition is met is to be curtailed by the issue of a determination. As to reg. 13, the first limb of reg. 13(3) applies to a situation where a direction "has been made". There is no clear basis to read that as, for example, "has been or should have been made".

49. More fundamentally, the only remedy that the FTT can provide in respect of a refusal notice under reg. 9(6) is to direct HMRC under reg. 9(9) to make a direction under reg. 9(5). The FTT has no power to issue a direction under reg. 9(5) itself. Regulation 9(9) necessarily presupposes that HMRC would have power to do what they are directed to do by the FTT. However, on HMRC's construction they would not if there was an extant determination. Mr Simpson suggested that this conundrum could be resolved by the FTT reaching the necessary factual conclusions without making a formal direction, but with respect that does not address the point that the FTT's only operative function under reg. 9 is to give a direction to HMRC under reg. 9(9) to make a direction under reg. 9(5). The FTT's jurisdiction must be based on it being able to direct HMRC to make an effective direction.

50. The sixth point relates to the relevance of the appeal procedure under reg. 9 to a case that engages condition B rather than condition A. Although the refusal notice process and the appeal right conferred by reg. 9(7) relate to condition A and not to condition B, there is no proper basis to draw a distinction between them in interpreting reg. 13(3). There is a single power to issue a direction under reg. 9(5). Regulation 13(3) is agnostic about which condition in reg. 9 may be in point. Thus, if the effect of HMRC's approach is to exclude appeal rights in relation to condition A, as *North Point* illustrates, that is strongly indicative that the approach is wrong even if it is condition B and not condition A that is relevant on the facts of the case.

51. The seventh point relates to a further concession rightly made by Mr Simpson during argument. It was a necessary part of Mr Firth's argument that an appeal against a determination could properly raise as a ground of appeal that a reg. 9 direction should be made. This flows from the fact that (absent a reg. 9 direction) the amount determined under reg. 13 is HMRC's estimate of the amount that should have been deducted, calculated by applying the relevant percentage to the payments made (excluding the cost of materials). An appeal against a reg. 13 determination might relate, for example, to whether the payments fell within the CIS at all or whether a sufficient allowance was made for materials, but without reg. 9 there would be no basis for the contractor to claim that there was no liability because he took reasonable care to comply, or on the basis that the sub-contractor has met their tax liabilities.

52. It follows that, in order to keep a determination open while a dispute about the application of reg. 9 is resolved, the application of reg. 9 must be capable of being properly raised as a ground of appeal against the determination. Otherwise the determination would become final and preclude any possibility of a direction. I understood Mr Simpson to accept this in his supplementary skeleton and during oral argument, albeit only if the application of reg. 9 had been raised by the contractor before a determination is made (as to which see above).

53. Again, there is no basis to distinguish between condition A and condition B in this respect. The distinction between them relates to the means by which a dispute as to their application is resolved. In the case of condition A it can be resolved by the FTT via an appeal under reg. 9(7). In the case of condition B the FTT has no jurisdiction to resolve the dispute, so if it cannot be resolved by agreement the contractor's only option is likely to be judicial review proceedings.

54. In either case, once the dispute is resolved it will result in a decision to the effect that a direction should or should not be made. If a direction can lawfully be made in accordance with that decision then the appeal against the determination can be resolved on the basis that it should not include amounts covered by the direction, in accordance with the first limb of reg. 13(3). Reading reg. 13(3) as Beech say it should be read would permit that to occur. A direction would be made but would not immediately apply to the amount in question because of the second limb of reg. 13(3). However, as soon as the determination is reduced in recognition of the fact that it "must not include" amounts in respect of which a direction has been made (in accordance with the first limb), the direction would apply.

55. The eighth (and linked) point relates to finality. The judge was obviously concerned about an "open-ended" ability to request a direction under reg. 9. However, it is not open-ended. Once a determination has been made and becomes final, either through not being appealed or by an appeal being determined, there would be no scope to challenge it on

the basis that a direction should be or should have been made. Further, if the contractor did not properly put reg. 9 in issue before the FTT then the appeal would be determined without reference to it, and as Mr Firth pointed out any challenge to the FTT's decision raising it as a new point is likely to receive short shrift.

56. This point also clearly illustrates that Beech's preferred interpretation does not deprive the second limb of reg. 13(3) of practical effect. It prevents a direction which is made following a determination that covers the same amount from having an operative effect, except insofar as the determination is subsequently reduced or cancelled.

57. Finally, HMRC's reliance on their collection and management powers does not provide a proper solution to the difficulties raised by their interpretation.

58. The argument was that in an appropriate case HMRC would not seek to collect an amount covered by a determination where a direction should have been made that would have prevented that amount from being included in the determination. However, it is entirely unclear in what circumstances that would occur and it is also far from obvious how HMRC would justify the non-collection of an amount (or, logically, repayment of it if it has already been collected) that on their approach is due under the legislation. I would add that it also appears to be at odds with HMRC's actual behaviour in this and earlier cases, which has been founded on a view that there is simply no power to consider the substance of any claim under reg. 9 once a determination has been made. Indeed, HMRC sought to justify this in their original skeleton argument for the appeal on the basis that the money would be spent on public services.

59. It is trite law that "One should be taxed by law, and not be untaxed by concession": *Vestey v Inland Revenue Comrs* [1979] Ch 177, 197, per Walton J, cited by Bingham LJ in *R v Inland Revenue Comrs, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 and in turn by Lord Wilson in *R (Davies) v HMRC* [2011] 1 WLR 2625 at [28]. The House of Lords also made clear in *R (Wilkinson) v Inland Revenue Comrs* [2005] UKHL 30, [2005] 1 WLR 1718 that the power to grant concessions is limited.

60. Even if the power HMRC rely on existed in this case, the proposition that whether the contractor is required to pay an amount for which it has been determined to be liable should depend on the exercise of HMRC's discretion, rather than on the language of the legislation, and should do so in circumstances where if the order of events had been different then a direction would have prevented a determination being made, is unattractive. It is made all the more so in circumstances where the overall result may well be a windfall because the sub-contractor's liabilities have, in fact, been discharged, such that the mischief at which the CIS is directed does not exist. Such a result would need clear words to justify it. There is an analogy here with *R v Inland Revenue Comrs, ex p Woolwich* [1990] 1 WLR 1400, where Lord Oliver discussed at pp.1412-1413 the need for clear words to seek tax on more than one year's income in a single tax year.

61. Accordingly, I consider that Beech's interpretation is to be preferred. HMRC do have power to issue a direction under reg. 9 in respect of an amount that has been the subject of a determination under reg. 13. Provided that the determination remains capable of adjustment, reg. 13(3) provides a means for such a direction to be reflected in the determination. It follows that *North Point* and earlier FTT decisions that proceeded on the basis that HMRC had no such power were wrong to do so and should not be followed.

Conclusion

62. In conclusion, I would allow the appeal, quash HMRC's decision not to consider Beech's claim under reg. 9(4) of the CIS regulations and require HMRC to reconsider the claim in accordance with the decision of this court.

Lord Justice Lewison:

63. I agree.

Lord Justice Underhill:

64. I also agree.